

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY ADAM MORRIS,

Defendant-Appellant.

UNPUBLISHED

October 24, 2006

No. 262697

Macomb Circuit Court

LC No. 04-003886-FC

Before: Murray, P.J., and O’Connell and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted of kidnapping, MCL 750.349, conspiracy to kidnap, MCL 750.157a; MCL 750.349, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 15 to 40 years in prison for his kidnapping conviction, 15 to 40 years in prison for his conspiracy to kidnap conviction, 18 to 48 months in prison for his felonious assault conviction, and two years in prison for his felony-firearm conviction. He appeals as of right, and we affirm.

Defendant first argues that the trial court erred when it denied his motion to suppress James Bonner’s (James) in-court identification. We disagree. When considering a ruling on a motion to suppress evidence, we review the circuit court’s findings of fact for clear error, giving deference to the circuit court’s resolution of factual issues. We may not substitute our judgment for that of the circuit court or make independent findings. However, we review the circuit court’s ultimate decision on the motion to suppress de novo. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005); *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004).

Here, at trial, James identified defendant as the unmasked man who chased him with a gun, commanded him to lie on the ground and threw a trash can at him on the day that another man, who was with defendant, kidnapped James’s son, Kenneth Jones (Jones), and stole April Bonner’s (April) Escalade. James specifically stated that he “most definitely” recognized defendant and was “one-hundred percent sure” that defendant was the unmasked man. James further testified that he also identified defendant at the November 12, 2004, preliminary examination. Moreover, James admitted that he never viewed a lineup and did not see defendant from the time of the incident until the preliminary examination, a period of approximately 17 months. Before James’s aforementioned testimony, the trial court heard defense counsel’s motion to suppress James’s in-court identification of defendant. Defense counsel argued that the

identification should be suppressed because a lineup was never conducted and the preliminary examination was an unduly suggestive procedure. The trial court denied defendant's motion.

"If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification." *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). A preliminary examination identification can be impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 287-288; 545 NW2d 18 (1996); *People v Solomon*, 47 Mich App 208, 216-218; 209 NW2d 257 (1973), (Lesinski, J., dissenting), reversed for reasons stated in the dissenting opinion, *People v Solomon*, 391 Mich 767; 214 NW2d 60 (1974).

Here, the record reflects that approximately 17 months elapsed between the incident and the preliminary examination. However, no evidence was presented that the police told James at or before the preliminary examination that they had the right person in custody. Furthermore, the record reflects that defendant did not have a mask on, defendant chased James for approximately five to ten minutes, James got a good look at defendant's face, and James described defendant to the police as a black man with real dark skin, wearing blue jeans and a hooded sweatshirt. Additionally, the record reflects that James identified defendant at the preliminary examination based on his "face, his lips, the nose, [and] his eyes." Therefore, we conclude that the preliminary examination was not so impermissibly suggestive that it led to a substantial likelihood of misidentification, and thus, the trial court did not err when it denied defendant's motion to suppress James's in-court identification. *Hornsby*, *supra* at 466; *McElhaney*, *supra* at 287-288; *Solomon*, *supra* at 216-221.¹

Defendant next argues that the trial court abused its discretion when it admitted into evidence the fact that defendant provided a false name at the time of his arrest. We disagree. We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Furthermore, the harmless error statute presumes that a preserved error is not a ground for reversal unless, after an examination of the entire cause, it affirmatively appears that it was more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).²

¹ We note that the trial court's rationale denying defendant's motion was on procedural grounds, but we can affirm a trial court's ruling if it reached the right result, albeit for the wrong reason. *People v Brake*, 208 Mich App 233, 242; 527 NW2d 56 (1994).

² Moreover, regarding defendant's argument that the admission of the aforementioned evidence infringed on his right to remain silent, we conclude that defendant abandoned this argument by failing to provide support for his argument in his brief. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

All relevant evidence is admissible, except as otherwise provided by the constitutions, rules of evidence, or other rules of the Supreme Court. MRE 402; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). Relevant evidence is evidence that has any tendency to make the existence of any fact, which is of consequence to the determination of the action, more probable or less probable than it would be without the evidence. MRE 401; *Taylor, supra* at 521. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Taylor, supra* at 521. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id.* at 521-522. Furthermore, evidence that a defendant gave a false name at the time of his arrest may be admitted to show a consciousness of guilt. *People v Cutchall*, 200 Mich App 396, 399-401; 504 NW2d 666 (1993), overruled on other grounds, *People v Edgett*, 220 Mich App 686, 691-694; 560 NW2d 360 (1996).

Here, Sergeant Eric Decker (Decker) testified that when he pulled defendant over for speeding on June 24, 2004, defendant told him that his name was Michael Daniel Stinson. At the time Decker pulled defendant over, there was a warrant out for defendant's arrest. Thus, we conclude that the fact that defendant gave a different name to Decker is relevant and its probative value is not substantially outweighed by the danger of unfair prejudice because such evidence can establish a consciousness of guilt. *Taylor, supra* at 521-522; *Cutchall, supra* at 399-401. Moreover, even without the use of Decker's aforementioned testimony, the evidence clearly established that defendant and Jemirah Carter (Carter) were acting together. The evidence revealed that Carter stole April's Escalade and kidnapped Jones, and defendant chased James with a gun, commanded James to lie down and threw a garbage can at James. Therefore, even if the trial court abused its discretion when it allowed Decker to testify that defendant gave a false name at the time of his arrest, such error would not have affected the outcome of the proceedings, and thus, such error would have been harmless and would not require reversal. *Lukity, supra* at 496.

We also disagree with defendant's argument that the trial court erred when it failed to suppress Sergeant George Sobah's (Sobah) "flight" testimony.³ Defendant failed to properly preserve this argument for appeal by objecting to the admission of the testimony. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). We review unpreserved claims for plain error which affect a defendant's substantial rights, reversing only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

As previously discussed, all relevant evidence is admissible, except as otherwise provided by the constitutions, rules of evidence, or other rules of the Supreme Court. *Taylor, supra* at 521. Furthermore, it is well established that evidence of flight is admissible. *People v*

³ We conclude that defendant has abandoned his argument that the admission of Sobah's testimony infringed on his right to remain silent because defendant has failed to provide support for his argument in his brief. *Kevorkian, supra* at 389.

Coleman, 210 Mich App 1, 4; 532 NW2d 885 (1995). Such evidence is probative because it may indicate consciousness of guilt, although evidence of flight itself is not sufficient to sustain a conviction. *Id.*

Here, Sobah testified that a warrant was issued for defendant's arrest in July of 2003, and despite various efforts to locate defendant, defendant was not found and arrested until June of 2004. Given the fact that there was a 21-month delay between the incident in question and defendant's trial, we conclude that Sobah's testimony was not offered to establish flight, but rather was merely offered to explain why there was such a long delay between the incident and the trial. Sobah's testimony was relevant because it helped explain the aforementioned delay. Additionally, since defendant was on trial, it was already obvious that he had been arrested, and thus, we disagree with defendant's argument that the probative value of Sobah's testimony regarding the fact that a warrant had been issued for defendant's arrest was outweighed by the danger of unfair prejudice. Therefore, the trial court did not commit plain error when it failed to sua sponte strike Sobah's aforementioned testimony. *Taylor, supra* at 521-522.⁴

Defendant next argues that he was denied his constitutional right to a fair trial through misconduct of the prosecutor. We disagree. Defendant failed to properly preserve his prosecutorial misconduct arguments by objecting to the various instances of alleged misconduct before the trial court. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999). Thus, our review is limited to plain error which affected defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). An attorney may not knowingly offer or attempt to elicit inadmissible evidence, but may argue reasonable inferences from the evidence. *People v Dyer*, 425 Mich 572, 576; 390 NW2d 645 (1986). A prosecutor need not limit his argument to the blandest possible terms. *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005). Moreover, a prosecutor may not appeal to the jury to sympathize with the victim. *Watson, supra* at 591. When reviewing a claim of prosecutorial misconduct, we examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005).

⁴ Moreover, even if it were found that Sobah's testimony was evidence of flight, evidence of flight is admissible in Michigan. *Coleman, supra* at 4. Furthermore, any prejudicial effect of the testimony would have been relieved by the trial court's instructions that evidence of flight "does not prove guilt. A person may run or hide or [sic] innocent reasons such as panic, mistake, or fear," and that it was the jury's decision to decide whether the evidence "shows that defendant had a guilty state of mind." Thus, even if it were found that Sobah's testimony was evidence of flight, the trial court did not commit plain error when it failed to sua sponte strike Sobah's testimony. *Taylor, supra* at 521-522; *Coleman, supra* at 4.

Here, during the prosecutor's opening statement, he stated, "[m]any of you are parents. Certainly all of you were children. . . . And in this case we have a parents' [sic] worst nightmare. Now many of you, if not all of you, while sleeping have a very bad nightmare." The prosecutor went on to explain how a juror would have a bad dream but then wake up and realize that it was just a dream, but in this instance the victims woke up and realized their bad dream was reality. We agree with defendant's contention that the prosecutor's aforementioned comments essentially invited the jurors to put themselves in the victims' shoes. However, the trial court instructed the jury that it "must not let sympathy or prejudice influence [its] decision," it is only to consider properly admitted evidence and that "the lawyers' statements [and] arguments are not evidence." Thus, we conclude that the prosecutor's aforementioned comments did not deny defendant his right to a fair and impartial trial.

Additionally, during the prosecutor's closing argument, he stated, "[w]here's [defendant] during this 11 month period? Have you heard any evidence that he was in a coma . . . Did we hear that he was fighting for our country in Afghanistan or Iraq? . . . Did we hear that he had some important CIA job assignment and it took him on a mission? No, of course not. Did we hear that he's an astronaut, that he's somewhere on a satellite." Here, evidence was provided that a warrant was issued for defendant's arrest in July 2003, and despite numerous efforts by the police to locate defendant after the warrant was issued, defendant was not arrested until he was pulled over for speeding in June 2004. Therefore, we conclude that the prosecutor's aforementioned comments were merely colorful comments on the evidence that had been presented, and thus, were proper. *Dyer, supra* at 576; *Williams, supra* at 71. Moreover, the trial court instructed the jury that the prosecutor had the burden to prove every element of the charged crimes beyond a reasonable doubt, defendant did not need to present any evidence or prove anything, defendant had an absolute right not to testify and the jury was not to consider the fact that defendant did not testify. Thus, even if it were found that the prosecutor's aforementioned comments improperly "infringed" on defendant's "right to remain silent by commenting on his failure to come forward with evidence" of his whereabouts, we conclude that the comments did not deny defendant his right to a fair and impartial trial.

Finally, during the prosecutor's closing argument, he stated that defendant gave a false name when he was pulled over for a speeding ticket and argued that defendant must be worried about something else if he gave a false name when he was pulled over for a nonarrestable offense. However, Decker testified that when he pulled defendant over for speeding on June 24, 2004, defendant told him that his name was Michael Daniel Stinson, and Decker stated that he opined that defendant probably told him a different name because he was attempting to cover something up. Therefore, the prosecutor's aforementioned closing argument comments merely used the evidence presented to argue a reasonable inference from the evidence. Thus, the prosecutor's comments did not deny defendant his right to a fair and impartial trial. *Dyer, supra* at 576. Likewise, we reject defendant's argument that the prosecutor's comments amounted to plain error that affected defendant's substantial rights. *Watson, supra* at 586.

Defendant next argues that he was denied his constitutional right to the effective assistance of counsel. We disagree. Defendant failed to properly preserve this issue by raising a motion for a new trial or an evidentiary hearing. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004), overruled on other grounds, *People v Monaco*, 474 Mich 48; 710 NW2d 46 (2006). When reviewing a claim of ineffective assistance of counsel when an evidentiary

hearing is not previously held, our review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). As a matter of constitutional law, we review the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which a court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to present additional evidence constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense that would have affected the outcome of the proceedings. *Id.* Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

As previously discussed, the prosecutor's challenged opening statement and closing argument remarks did not deny defendant his right to a fair and impartial trial, and thus, the prosecutor's remarks did not constitute prosecutorial misconduct. *Watson, supra* at 586. Therefore, any objection by defense counsel to the prosecutor's questioned remarks would have been futile. Accordingly, we reject defendant's argument that he was denied his constitutional right to the effective assistance of counsel when defense counsel failed to object to the prosecutor's questioned remarks. *Ackerman, supra* at 455.

We also reject defendant's argument that he was denied his constitutional right to the effective assistance of counsel when defense counsel failed to present an expert regarding identification or, in the alternative, request an instruction on the grave dangers of misidentification. As discussed, the record reflects that James's identification of defendant was credible. Furthermore, James testified that the man who chased him had a roll of duct tape in his hand, one of the victims' neighbors stated that they saw a black male throw a roll of duct tape over a fence, a roll of duct tape was retrieved from a neighbor's pool cover, the roll of duct tape revealed defendant's fingerprints and Officer Tracy McIntosh testified that she was "a hundred percent certain" that defendant touched the roll of duct tape. Thus, James's identification of defendant was not the only evidence presented that linked defendant to the charged crimes. Therefore, even if defendant could rebut the presumption that defense counsel's failure to present an expert identification witness was sound trial strategy, *Dixon, supra* at 398, we conclude that presenting an expert identification witness would not have affected the outcome of the proceedings. Similarly, requesting an instruction on misidentification would not have affected the outcome of the proceedings. Accordingly, defendant was not denied his constitutional right to the effective assistance of counsel when defense counsel failed to present an expert on identification or, in the alternative, request an instruction on the dangers of misidentification. *Toma, supra* at 302-303.

Defendant's final argument on appeal is that the prejudicial effect of the cumulative errors in this case mandates reversal. We disagree. Defendant failed to properly preserve this argument for appeal by making a cumulative error objection before the trial court, so we review this issue for plain error affecting substantial rights. *Carines, supra* at 764-767. We have already concluded, however, that defendant has not established the occurrence of any errors. Therefore, there can be no cumulative effect of errors that would merit reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood